

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Appellate Case No. 2019-001354

Stephen and Beverly Noller and Michael and Nancy Halwig, Appellants,
v.
Daufuskie Island Utility Company, Incorporated and South Carolina Office of Regulatory Staff,
..... Respondents.

APPELLANTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE COMMISSION ERR WHEN IT DENIED JURISDICTION OVER THIS MATTER WITHOUT ADDRESSING THE REQUIREMENT TO APPROVE THE AGREEMENT AT ISSUE?
- II. DID THE COMMISSION ERR IN DENYING JURISDICTION IN THIS MATTER WHERE RESPONDENT FAILED TO PROVIDE ADEQUATE AND PROPER WATER AND SEWER SERVICE TO APPELLANTS UNTIL APPELLANTS REPLACED ITS DESTROYED MAINS?

STATEMENT OF THE CASE

Appellants filed their initial Complaint in this matter with the Commission on November 16, 2018, Docket No. 2018-364-WS. At the request of the Commission, Appellants and Respondent Daufuskie Island Utility Company, Incorporated (“DIUC”) each filed a brief on jurisdictional matters on March 6, 2019, and Appellants and Respondents each filed a responsive brief on jurisdictional matters on March 13, 2019. On March 20, 2019, the Commission held a hearing solely on the issue of its jurisdiction.

On June 12, 2019, the Commission issued the Order dismissing the underlying Complaint in this matter determining as the sole basis for dismissal that the Commission does not have statutory authority to grant monetary damages in favor of Appellants in their Complaint against DIUC. On June 21, 2019, Appellants filed a Motion for Reconsideration, which was denied on July 17, 2019.

Appellants filed their Notice of Appeal in this matter on August 15, 2019.

STANDARD OF REVIEW

The standard of review is governed by the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5), which provides as follows:

The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The decision of the Commission is entitled to a deferential standard and will be affirmed unless the decision is not supported by substantial evidence and does not represent an abuse of discretion. *See Total Envtl. Solutions, Inc. v. South Carolina Pub. Serv. Comm'n*, 351 S.C. 175, 180, 568 S.E.2d 365, 368 (2002); *Heater of Seabrook, Inc. v. Pub. Serv. Comm'n of South Carolina*, 324 S.C. 56, 60, 478 S.E.2d 826, 828 (1996); *Hamm v. South Carolina Pub. Serv. Comm'n*, 309 S.C. 282, 422 S.E.2d 110 (1992). The Commission's findings are presumptively correct, and the party challenging a decision of the Commission bears the burden of showing that the decision is "clearly erroneous in view of the substantial evidence on the whole record." *Id.*

The question of subject matter jurisdiction is a question of law. *Bargesser v. Coleman Co.*, 230 S.C. 562, 96 S.E.2d 825 (1957). A court's subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question. *Allison v. WL Gore & Assocs.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011). " This same principle applies to administrative agencies." *Id.*

FACTS

Appellants are John and Nancy Halwig, the owners of 46 Driftwood Cottage Lane, Daufuskie Island, Beaufort County, South Carolina, and Beverly and Stephen Noller, the owners of 36 Driftwood Cottage Lane, Daufuskie Island, Beaufort County, South Carolina.

Appellants' properties are within Melrose Plantation on Daufuskie Island. The Driftwood Cottage Lane area within Melrose has suffered from Hurricane Matthew, which struck on October 8, 2016. As a result of the erosion from Hurricane Matthew, a portion of Driftwood Cottage Lane was washed out, and with it water and sewer mains owned by the Respondent DIUC. While the homes to the south of the washout on Driftwood Cottage Lane continued to have service from DIUC, the homes and lots north of the washout, particularly the homes of John and Nancy Halwig and Beverly and Stephen Noller, did not. When Respondent DIUC was asked when it would restore the utility service to these homes, the utility stated in a letter that it would not be able to restore service and that the two families on that street would have to provide an alternative extension of mains and utilities at their own, personal cost. Letter from DIUC to Josey December 10, 2015, Complainants Exhibit of Direct Testimony of Michael Halwig filed January 23, 2019, Part 2, page 1 of 33, (R. p. 155)¹. When the Halwigs filed a Complaint with the South Carolina Office of Regulatory Staff ("ORS") regarding the refusal of Respondent DIUC to restore service, the ORS replied that the statutes do not provide a definitive time frame within which service has to be restored.²

¹ Note the Appellants did not see this letter until over a year later after Hurricane Matthew. Rebuttal Testimony of Michael Halwig filed February 13, 2019, pp. 5 (R. p. 80) (first question and answer)

² Letter from ORS to Dr. Halwig dated December 2, 2016, Exhibit DMH 3 of direct testimony of Ms. Hipp, ORS, filed February 6, 2019, pp. 18-19 (R. pp. 71-72).

Appellants had no choice but to obtain water and sewer service from DIUC. The Complaint filed with the Commission in this matter concerns the refusal of Respondent DIUC to provide water or sewer service to Respondents following damage to its mains under a portion of Driftwood Cottage Lane. DIUC insisted that these customers plan, obtain the permits for, and pay for the construction and installation of mains connecting the water and sewer mains on Martinangel Road to those on Driftwood Cottage Lane adjacent to their properties before it would restore service. Appellants engaged an engineer, hired a contractor and began installation in November 2017 so they could get water and sewer service restored and stop the suffering of the loss of use of their homes since October 2016. Rebuttal Testimony of Michael Halwig filed February 13, 2019, pp. 3 (R. p. 81) (second question and answer).

In January 2018 DIUC proffered a written agreement (the Customer Service Agreement, Complainants Exhibits filed January 23, 2019, Part 5, pp. 23-25 (R. pp. 15-17)) requiring Appellants pay for the installation that they had already begun and provide the installed mains to it upon completion in order to restore their water and sewer service. The Agreement was not submitted to or approved by the ORS or the Commission before being presented to and executed. Rather than walk away from and abandon their homes, and since they had already contracted someone to install the replacement mains and had no other choice to restore service, Appellants signed the Agreement. Following the installation of the replacement water and sewer mains, Respondent DIUC refused again to provide service until Appellants signed a new agreement, the Addendum to the Customer Service Agreement, Complainants Exhibits filed January 23, 2019, Part 5, pp. 19-23 (R. pp. 18-20), in which DIUC demanded (1) payment of additional expenses never mentioned in the initial Customer Service Agreement, including its attorney's fees and taxes expected to be imposed on Respondent DIUC for the costs of installation paid for by the

Appellants for the replacement mains; and (2) a withdrawal and release of any and all claims and complaints the Appellants asserted or may assert against Respondent DIUC before the Commission or otherwise in regard to the installation of the replacement mains. Respondent DIUC demanded execution of this Addendum and payment prior to restoring water and sewer service to the Appellants' homes. Respondent DIUC did not provide service until after Appellants filed the Complaint with the Commission in this matter. ORS Letter to Commission December 21, 2018 (R. p. 155); DIUC Letter to counsel and ORS December 26, 2018 (R. p. 163).

Appellants were without water and sewer service for over two (2) years, initiated and completed the installation of replacement mains at their cost and provided them to Respondent DIUC, and had to execute the Agreement with Respondent DIUC to be assured of getting service restored. Appellants have no assurance that DIUC will continue to provide service other than the initial Order of the Commission dismissing the matter. Order No. 2019-424 of June 12, 2019 (R. pp. 2-3).

ARGUMENTS

I. THE COMMISSION MADE AN ERROR OF LAW IN DENYING JURISDICTION OVER THIS MATTER WITHOUT ADDRESSING THE REQUIREMENT TO APPROVE THE AGREEMENT AT ISSUE.

The Commission committed an error of law in denying its jurisdiction in this matter without addressing the Customer Service Agreement and the requirement to review and approve it prior to its execution pursuant to S.C. Code Reg. 103-541 and -743. The regulations required the Commission to review this contract prior to execution, and it did not do so, because Respondent DIUC failed to provide it for review. Through this Agreement, DIUC shifted the cost burden of maintaining its service and systems to the Appellants by forcing them to replace DIUC's facilities and equipment purportedly in an effort to avoid a request for a rate increase,

or the alternative of paying for the replacement mains itself. DIUC claimed that the responsibility to maintain DIUC's facilities and equipment was the responsibility of the Appellants, because such maintenance would affect the utility's future rates. Direct Testimony of John Guastella filed February 6, 2019, p.3 1.14 - p. 4 1.20 (R. p. 49 1.14 – R. p. 50 1.20). The Commission has the sole authority to set rates for public utilities, such as DIUC. The Commission has the jurisdiction and the duty to review this Agreement and its effect because it waddresses both DIUC's rates and service. DIUC has not followed the Commission's regulations in forcing the Appellants to pay for the utility's facilities and equipment and in failing to present the Agreement to the Commission for approval before entering into it. The Commission's failure to address the Agreement and determining the request for reimbursement was a claim for monetary damages is arbitrary, capricious and erroneous. No damages from loss of use of their property were requested, only reimbursement of the cost of installing the mains.

The Commission is a creature of statute, and its authority is limited to that granted by the statutes. *Nucor Steel, a Div. of Nucor Corp. v. Public Service Comm.*, 310 S.C. 539, 426 S.E.2d 319 (S.C. 1992)(citations omitted). Such statutes must be interpreted according to their clear meaning. *Id.* The regulations promulgated by the Commission likewise are derived from the statute, and, in interpreting the statute and regulations, they must be given their plain meaning. *See Doe v. South Carolina Dept. of Health and Human Services*, 727 S.E.2d 605, 398 S.C. 62 (S.C. 2011).

The Commission has broad jurisdiction to regulate all public utilities in South Carolina. The review and approval of rates charged for utility services is a significant part of the jurisdiction of the Commission, but not the only part. The following applicable statutes provide for regulation of public utility operations on a broad spectrum:

SECTION 58-3-140. Powers to regulate public utilities. (A) Except as otherwise provided in Chapter 9 of this title, the commission is vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State and to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State.

. . .
SECTION 58-5-210. Supervision and regulation of rates and service. The Public Service Commission is hereby, to the extent granted, vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State, together with the power, after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, observed and followed by every public utility in this State and the State hereby asserts its rights to regulate the rates and services of every "public utility" as herein defined.

. . .
SECTION 58-5-290. Correction by Commission of improper rates and the like. Whenever the Commission shall find, after hearing, that the rates, fares, tolls, rentals, charges or classifications or any of them, however or whensoever they shall have theretofore been fixed or established, demanded, observed, charged or collected by any public utility for any service, product or commodity, or that the rules, regulations or practices, or any of them, affecting such rates, fares, tolls, rentals, charges or classifications, or any of them, are unjust, unreasonable, noncompensatory, inadequate, discriminatory or preferential or in any wise in violation of any provision of law, the Commission shall, subject to review by the courts, as herein provided, determine the just and reasonable fares, tolls, rentals, charges or classifications, rules, regulations or practices to be thereafter observed and enforced and shall fix them by order as herein provided.

There is no question that DIUC is subject to the Commission's jurisdiction and applicable statutes and regulations over water and sewer services, not only for its rates charged to customers but also the practices, standards and services of this and any other public utility.

The Commission has the authority to review the business practices and expenses of a public utility. *See Utilities Services of SC v. Office of Regulatory Staff*, 392 S.C. 96, 708 S.E.2d 755 (SC 2011); *Kiawah Property Owners Group v. Public Service Comm.*, 392 S.C. 232, 593 S.E.2d 148 (SC 2004); and *Patton v. Public Service Comm.*, 280 S.C. 288, 312 S.E.2d 257 (SC 1984). In exercising its power to supervise and regulate rates and service, "the Commission must be allowed the discretion of imposing reasonable requirements on its jurisdictional utilities

to insure that adequate and proper service will be rendered to the customers of the utility companies.” *Patton*, 312 S.E.2d at 260. The Commission “is entitled to create incentives for utilities to improve their business practices.” 708 S.E.2d at 760. The Commission “may determine that some portion of an expense actually incurred by a utility should not be passed on to consumers.” *Id.* The Commission “may determine - independent of any party - that an expenditure is suspect and requires further scrutiny.” *Id.* at 761. Just as the Commission has the authority to review a public utility’s expenses and business practices at the time of a request for a rate increase, the Commission also has the authority and the obligation to evaluate a utility’s expenses and business practices upon complaint of its customers, particularly when such business practices are employed in order to circumvent the Commission’s authority to establish its rates and avoid review of contracts that enable service to be provided. The Commission has not only the explicit authority provided in the statutes and regulations cited above and in Appellants’ Brief but also the implicit authority needed to carry out those responsibilities. *See Hamm v. Central States Health and Life Co. of Omaha*, 299 S.C. 500, 386 S.E.2d 250 (1989)(holding in favor of the implied power to issue refunds).

The Commission also has authority over a utility’s agreements regarding its willingness and ability to provide service under the Agreement. Commission regulations require a utility to submit a contract regarding utility service to the ORS *and* to obtain approval from the Commission:

No utility shall execute or enter into any agreement or contract with any person, firm, partnership, or corporation or any agency of the Federal, state, or local government which would impact, pertain to, or effect said utility’s fitness, willingness, or ability to provide sewerage service, including but not limited to the treatment of said water, **without first** submitting said contract in form to the commission and the ORS and **obtaining approval of the commission.**

S.C. Code Reg. 103-541 (emphasis added) and 103-743 (water service). This language requires that the Customer Service Agreement be submitted to the Commission and the ORS, and also that it be approved by the Commission. The Agreement addresses and affects the utility's willingness or ability to provide water and sewer services. Regulation 103-703.C³ supports the fact that the agreement is not deemed approved or consented to by the mere filing of it. DIUC did not even file the Agreement.

DIUC did not present the Customer Service Agreement to the ORS or the Commission for review and approval prior to execution, and never presented the Addendum to the Customer Service Agreement to them. The Commission has the authority to approve, or not approve, such an agreement. Approval of this Agreement, forced upon Appellants under threat of losing their homes, would be inconsistent with Commission regulations and the statutory authority to regulate the services of every utility in this state.

After execution, DIUC presented the Customer Service Agreement to ORS.⁴ While the ORS responded that DIUC did not need to submit it without any explanation, the regulation clearly requires that the Commission review the agreement and make this decision. This is clear jurisdictional authority for the Commission to find the agreement was not authorized, is void and for the parties to be put back in their positions prior to entering into the agreement. This would require Respondent to reimburse Appellants for the expense of replacing DIUC's mains. Unlike the term used by the Commission, Appellants did not seek monetary damages but only reimbursement of the cost of installation of the water and sewer mains now owned by DIUC.

³ S.C. Code Reg. 103-703.C provides "No rate, *contract*, or rules and regulations of any utility under the jurisdiction of this commission shall be deemed approved or consented to by the mere filing of a schedule, or other evidence thereof, in the offices of the commission." (*emphasis added*).

⁴ See Respondent's pre-filed testimony of Michael Guastella, Pages 21, ll 15-23 (R. p. 66 ll 15-23), page 22, ll 1-2 (R. p. 67 ll 1-2).

Order No. 2019-424 of June 12, 2019 (R. pp. 2-3); Order No. 2019-523 of July 17, 2019 (R. p. 4); Complaint of Appellants filed November 16, 2018 (R. pp. 6-14).

Under Regulation 103-755, a utility can charge a customer all of the costs of installing and removing the service equipment when there is a provision of temporary service to a customer. The permanent replacement of the utility's own mains in this matter is not a temporary service but a permanent service which allows these Appellants to again enjoy the use of their private property. There is not a regulatory basis for requiring customers to replace water and sewer mains damaged by a storm. There is not a regulatory basis for avoiding review and approval of an agreement required by those regulations.

DIUC claimed that it can force Appellants to pay for the replacement mains under Regulations 103-702.4 and 103-502.3, which provide as follows:

A fee paid by a customer under a contract entered into by and between the utility and its customer providing terms for the extension of the utility's mains to service the customer.⁵

Respondent DIUC has claimed that the Customer Service Agreement is such a contract. However, Appellants were not requesting an extension of the utility's mains but repair and replacement of mains that were already in place. Before the mains were damaged by the storm in 2016, the water and sewer mains under Driftwood Cottage Lane were connected to the mains under Martinangel Road below where part of these mains were damaged on Driftwood Cottage Lane. The replacement mains installed by Appellants under the golf course connect the same mains. This work did not extend service to a new customer, and there was no increase or expansion of the service area of DIUC through replacement of the mains that were damaged.

⁵ This water regulation refers to a customer contribution in aid of construction, while the sewer regulation refers to a customer main extension fee.

Appellants had no choice but to abandon their homes or begin mitigating their damages by beginning the process to replace the mains to obtain service from DIUC. Only after Appellants had already hired the engineer and contractor and started the work did DIUC require a written agreement. The regulation referenced by DIUC is not a basis for forcing any agreement on an existing customer.

The Commission has jurisdiction over if and to what extent a utility like DIUC can charge an individual homeowner, like Appellants, with any tax imposed under the Jobs Credit and Tax Act⁶. DIUC's demand that the Appellants pay this tax to DIUC before DIUC was willing to restore service to the homes is within the Commission's jurisdiction. The Commission's broad authority to regulate utilities can address the agreement forced upon Appellants and not authorized by the Commission, the imposition of any fees or tax on the costs Appellants were forced to incur, and address DIUC's failure to plan and prepare for known and acknowledged threats to its equipment serving Appellants.

Finally, the Commission failed to include any rationale in its Order to show why the Commission dismissed the appeal for lack of jurisdiction. The Order did not set forth any grounds for the decision and did not specify why DIUC's decision was not a rate setting decision, why the Customer Service Agreement was not subject to its regulations in spite of the replacement mains clearly being within the terms of the regulations, or any rationale for the determination that a request for reimbursement is a request for monetary damages or would bar jurisdiction even if it was. Without clear reasoning the Commission dismissal must be reversed. *Heater of Seabrook Inc. v. Public Service Com'n*, 332 SC 20, at 26; 503 SE2d 739, at 742

⁶ PSC Docket #2017-381-A addresses the ways a utility can manage the contributions in aid of construction tax.

(1998). S.C. Code Ann. §58-3-250; *Total Envtl. Solutions, Inc. v. South Carolina Pub. Serv. Comm'n*, 351 S.C. 175, 568 S.E.2d 365 (2002).

II. **THE COMMISSION ERRED IN DENYING JURISDICTION IN THIS MATTER WHERE DIUC FAILED TO PROVIDE ADEQUATE AND PROPER WATER AND SEWER SERVICE TO APPELLANTS UNTIL APPELLANTS REPLACED ITS DESTROYED MAINS.**

The Commission committed an error of law in failing to acknowledge its jurisdiction in this matter where the statutes and regulations governing the Commission expressly provide for its jurisdiction over the provision of adequate and proper water and sewer service by public utilities to residents such as Appellants. The Commission has jurisdiction in this matter pursuant to S.C. Code Ann. Section 58-5-210, *et seq.*, which provides that the Commission is “vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this state.” This statute, with the sections referenced above, provide broad authority to this Commission concerning the operations and service furnished by public utilities. The Commission has jurisdiction over this matter because DIUC’s actions denied service to its existing customers, failed to comply with the Commission’s regulations, and was based on an unauthorized agreement. Moreover, DIUC’s decisions usurp the Commission’s authority by unilaterally deciding what costs would be allowed or not allowed under future rate decisions of the Commission. Respondent DIUC has a responsibility to provide continued service and the means to provide it, but its demand that Appellants provide the means, without presenting the Agreement demanded to the Commission, usurps the Commission’s authority. Appellants’ Complaint in this matter requested relief from the Commission, both in the form of a reimbursement of expenses of installation of the replacement mains forced upon Appellants through the Agreement and restoration of service.

The Commission has jurisdiction to address a utility's failure to provide adequate and proper service. *See* S.C. Code Ann. § 58-5-210, -710; *Patton v. Public Service Comm.*, 280 S.C. 288, 312 S.E.2d 257 (SC 1984); *In RE: Petition of the Office of Regulatory Staff*, 2016 WL 3054859 (SCPSC May 24, 2016); *In re Utilities Services of South Carolina, Inc.*, 2009 WL 2987189 (2009). DIUC has failed to meet its statutory and regulatory obligations to Appellants. DIUC has failed to install and maintain the facilities and equipment as required by regulations. DIUC has also forced the individual homeowner Appellants to meet the utility's obligations and to pay for those obligations. DIUC took these actions without the required approval of the Commission.

The regulations of the Public Service Commission allow customers of a public utility to file a complaint against the utility regarding "the charges, practices, facilities, or service" of the facility. S.C. Code Regs. 103-538 and -738. The regulations also allow customers to request a hearing before the Commission with respect to such complaints. *Id.* This is exactly what Appellants have done in this matter, and the statute and regulations provide the Commission with jurisdiction to hear the Appellants' Complaint and regulate this utility to address the complaints. By denying jurisdiction the Commission denied Appellants such a hearing.

The regulations further provide that the utility should not discontinue service to the customers until the Commission makes a decision in the hearing. *Id.* However, in this instance, the customers were without service from DIUC for over two years and only regained service from DIUC after they filed the Complaint in this matter, and the ORS, Appellants and DIUC agreed turning the water back on would not prejudice any party in this matter.

The regulations of the Public Service Commission for water and sewer service provide that a public utility shall install and maintain its facilities and equipment. S.C. Code Reg. 103-500 and -700. For example, Regulation 103-740 and Regulation 103-540 provide that:

Each utility, unless specially relieved in any case by the Commission from such obligation, shall operate and maintain in safe, efficient and proper conditions all of its facilities and equipment used in connection with the services it provides to any customer up to and including the point of delivery into systems or facilities owned by the customer.

The sewer service regulations include additional requirements for a utility to install and maintain service pipes. Regulation 103-555 states:

- A. Utility's Service Pipe—The utility shall install and maintain that portion of the service pipe from the main to the boundary line of the property being served, public road, or street under which such main may be located. The connection of the service pipe to the main must be made using appropriate wyes, saddles, or other acceptable fittings.
- B. Customer's Service Pipe—The customer shall install and maintain that portion of the service pipe from the end of the utility's service pipe into the premises served.

Utility shall be responsible for providing the location for the connection of the customer's service pipe to the utility's service pipe or the utility's main, whichever is applicable at the utility's expense, and at no expense to the customer.

Regulation 103-570.B states:

It shall be the obligation of each utility dependent upon its ability to procure and retain suitable facilities and rights for the construction and maintenance of the necessary system to furnish adequate sewerage service to its customers in the area or territory in which it operates.

Commission regulations address what a utility must do about interruptions of service:

Each utility shall make all reasonable efforts to prevent interruptions of service and, when such interruptions occur, shall endeavor to re-establish service with the shortest possible delay consistent with the safety of its customers and the general public. Scheduled interruptions should always be preceded by adequate notice to all affected customers.

S.C. Code Regs. 103-514.B; 103-714.B.

The Commission has the explicit authority provided in the statutes and regulations cited above and has at least the implicit authority needed to carry out those responsibilities. *See Hamm v. Central States Health and Life Co. of Omaha*, 299 S.C. 500, 386 S.E.2d 250 (1989)(holding in favor of the implied power to issue refunds).

In the Commission's Order dated July 17, 2019 (R. p. 4), the Commission notes that the Appellants' argument that DIUC failed to provide service is now deemed moot, since DIUC restored service following the filing of the Complaint in this matter. However, the prior order of the Commission denying jurisdiction, June 12, 2019 Order No. 2019-424 (R. pp. 2-3), is the only order requiring continued service. The Commission denied jurisdiction but ordered DIUC to provide service and continue providing service, obviously through the very mains at issue in the Agreement it failed to address. The issue for continued service is not moot as the Agreement at issue provided the means for service and a decision on the validity of the Agreement is required. The Commission has the jurisdiction to resolve the dispute over the Agreement but failed to acknowledge or exercise its jurisdiction, which is an arbitrary and capricious action and clear legal error. Appellants are entitled to a finding that the forced Agreement is void because it was not submitted to or approved by the Commission and to a refund of the charges and a continuing requirement for Respondent DIUC to provide service pursuant to the applicable statutes and regulations.

DIUC has willfully failed to provide water and sewer service to the Appellants' homes or even prepare in any way for the known risk to its equipment on Driftwood Cottage Lane. DIUC failed to plan for and provide replacement connections between the mains under Martinangel and Driftwood Cottage Lane, even though DIUC has admitted that erosion in this area has been a problem and that it has monitored the situation for years. Respondent DIUC has

placed its responsibility under these regulations on the individual homeowner Appellants without Commission approval, usurping the Commission's authority. DIUC has usurped Commission authority and regulations by requiring that the Appellants pay the tax under review by this Commission and its attorney's fees before it would provide service. DIUC usurps not only the Commission's authority but also that of federal and state agencies governing the South Carolina coastline by making a unilateral determination that there is no 'permanency' of the Appellant's homes to support the cost of installing the replacement mains, as part of its rationale to avoid any cost to itself.

Appellants had no choice but to deal with DIUC, which has sole rights to provide water and service in this territory and had no choice but to try to re-establish water and sewer service for their homes or suffer the complete loss of their homes upon the refusal of DIUC to prepare for the well-known threats to its system and to replace its equipment when damaged. Appellants had no choice but continue the loss of use of their property or take action themselves.

In denying jurisdiction, the Commission cites only the fact that the Complaint requested monetary damages, among all of the relief requested. The Complaint requests appropriate relief, including adequate and proper service, a refund of the charges or such other just and proper relief as the Commission may provide. Appellants did not request monetary damages incurred as a result of the loss of use of their properties during the more than two years that DIUC refused to provide water and sewer services. Appellants request "reimbursement" or a refund of the charges they incurred as a result of the installation of facilities and equipment that DIUC had a duty to install but did not. The regulations require reimbursement by a utility when overcharges have been paid by its customers. See R.103-533.3 and 733.4. The Commission erred when it found the request for reimbursement of the cost of installation of the facilities and equipment

was a request for monetary damages. The definitions of “reimburse” and “monetary damages” show the Commission was in error in denying jurisdiction. “Reimburse” means to make return or restoration of an equivalent for something paid, expended, or lost; to indemnify, or make whole, to pay back; “damages” means a pecuniary compensation for loss, detriment or injury through the unlawful act or omission of another. Appellants sought reimbursement of money expended, not damages from loss of rental income or loss of use and enjoyment of the houses. Such damages claims were not before the Commission, only a request for reimbursement or refund that the Commission has the authority to require of its regulated entities. This clearly erroneous decision of the Commission must be reversed.

The statutes and regulations expressly provide the Commission with jurisdiction over the public utility, the water and sewer services and the Agreement at issue in this matter. The statutes and regulations over utilities provide the Commission with jurisdiction over the Agreement and the practices and services of the Respondent.

CONCLUSION

The Commission has jurisdiction over Respondent DIUC and this matter pursuant to S.C. Code Ann. Section 58-5-210, *et seq.*, which provides that the Commission is “vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this state.” The Commission has jurisdiction over the enforcement of its regulations in the provision of services by the utilities regulated by it, including specifically those regulations at issue here. DIUC failed to provide its services to Appellants consistent with the Commission’s regulations, including but not limited to S.C. Code Regs. 103-540, 541, 740, and 743; and has attempted to circumvent the Commission’s authority over rates by forcing the individual homeowner Appellants to fund the installation of replacement facilities now owned by the utility, requiring

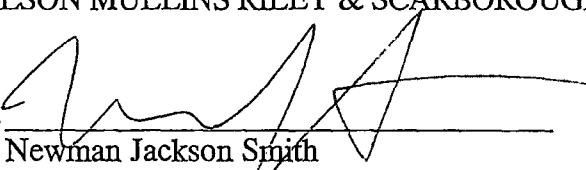
the payment of a federal tax expected to be imposed on the Respondent and payment of attorney's fees of Respondent before service would be restored under an agreement not authorized by the Commission. The Commission erred by denying its jurisdiction over the Agreement at issue based on determination that a request for monetary damages. Even if such damages were present instead of a request for reimbursement the Commission still has jurisdiction over the rates and charges imposed by a regulated public utility and, as evidenced in the initial Order the authority to require continued service. The Agreement is clearly within the Commission's jurisdiction to review and approve, or disapprove, and to direct appropriate action in response to its decision.

For all of the reasons set forth above Appellants request that this Court reverse the denial of jurisdiction of the Commission in this matter, find that the Agreement must be found to be void and direct that the Commission direct that the cost of installation paid to DIUC by Appellants under the Agreement be reimbursed to Appellants.

Signature Page Attached

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